NOS. 82-1312, 82-1345, 82-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CITY OF SANTA CLARA, CALIFORNIA

Daniel I. Davidson
Counsel of Record

Robert C. McDiarmid

Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 333-4500

Attorneys for the Respondent
City of Santa Clara, California

May 18, 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-1312, 82-1345, 82-1346

UTAH POWER & LIGHT COMPANY, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CITY OF SANTA CLARA, CALIFORNIA

REASONS WHY THE WRIT SHOULD BE DENIED

The City of Santa Clara here addresses only the extraordinary events which led to the current suggestion as to action by this Court filed by the Solicitor General in the document captioned Brief of the Federal Energy Regulatory Commission. The Brief in Opposition of Respondent City of Bountiful, Utah responds to the merits of the positions expressed in the Petitions for Certiorari filed in this proceeding. Santa Clara supports Bountiful's position on those matters.

The Federal Energy Regulatory Commission issued Opinion Nos. 88 and 88A (or "*Bountiful*") reported at 11 F.E.R.C. (CCH) Para. 61,337 and 12 F.E.R.C. (CCH) Para. 61,179,

respectively, on June 27, 1980 and August 21, 1980. The Commission issued its lengthy Opinion No. 88 based upon a study of the voluminous briefs and after a full day of oral argument. The Commission's decision was affirmed by the United States Court of Appeals for the Eleventh Circuit on September 17, 1982 after full briefing by all parties, including the Commission (which successfully urged affirmance).

The extraordinary events occurring at the Commission after the affirmance by the court of appeals are summarized at pp. 8 and 9 of the Brief for the Federal Energy Regulatory Commission ("FERC Brief") and have also been reported in general newspapers and the trade press in somewhat more detail. As judiciously phrased by the Solicitor General, at the conclusion of a closed meeting, "the Commission voted to request the Solicitor General to recommend to this Court that the Court grant the petitions for certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions to remand to the Commission for further consideration" (FERC Brief at 8).

It should be noted that the Solicitor General does not suggest that this Court follow the request of the Federal Energy Regulatory Commission, apparently because, after reviewing the transcript of the Commission's closed meeting, which has been made available to him but denied to those parties which support Opinion No. 88, he could not in good conscience assert that the FERC would reconsider the matter without having prejudged the outcome. If there is any inclination to follow the suggestion of the Solicitor General, we respectfully suggest that it would be appropriate for this Court to request that the Solicitor General furnish copies of the transcript of the meeting at which the Commission decided to seek to obtain jurisdiction again so that it could overrule the previous Commission. The Solicitor General candidly states that "a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt the contrary position" (FERC Brief at 9).

The Solicitor General "urges the Court to grant the petitions for certiorari, to vacate the judgment of the court of

appeals, and to remand the case to that court for such reconsideration as it deems appropriate in light of the intervening circumstances" (FERC Brief at 10). The sole intervening circumstance relied on by the Solicitor General is that "a majority of the Commissioners, four of whom were appointed after the issuance of Opinion Nos. 88 and 88A, expressed their disagreement with the Commission's earlier position in these orders" and, "that a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt the contrary position" (FERC Brief at 8, 9).

The Commission in its Initial Order of May 3, 1979 establishing this proceeding stated that its inquiry into the Section 7(a) municipal preference would "be limited to . . . purely legal issues of statutory construction. . . ." (PG&E Pet. 23a.[1]) In its Opinion 88, the Commission itself recognized that its role was "the same" as that of a court:

> Within the framework of this proceeding established by our order of May 3, 1979, we view our present role as being the same as that of the District of Columbia Circuit in *Chemehuevi Tribe of Indians* v. *Federal Power Commission, infra.* In other words, the principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.

(PG&E Pet. 23a.) The Commission, by then comprising four of the five current Commissioners, urged and obtained from the United States Court of Appeals for the Eleventh Circuit an affirmance of its purely legal decision. The court of appeals began its opinion, "We are faced with a purely legal question regarding the statutory construction of section 7(a) of the Federal Power Act. . . ." (PG&E Pet. 1a).

---

[1] Citations to the opinions of the Commission and of the court of appeals below are to the separately bound appendix to the petition filed by Pacific Gas and Electric Company.

Now, the Commission, without benefit of oral argument, without any new briefs on the issue, without having jurisdiction to reconsider the merits, without, so far as appears, even seriously reviewing the prior briefs of those who supported Opinion No. 88, and without the thorough consideration of the former Commission, which included the intellectual discipline involved in producing an opinion, appears to have decided, in the words of the Solicitor General "to be ready to overrule" its prior decision and to "adopt the contrary position."

In these circumstances, it is readily apparent that the appointees of one administration, on the basis of unknown and almost surely procedurally improper representations to them, have belatedly decided, dehors a record, to overrule the considered opinion of a Commission appointed by a prior administration, although the issue is a purely legal one of the construction of a statute passed by Congress in 1920.[2]

The current Commission has not even favored this Court or the parties with any explanation of the legal basis of its current position.[3] If the Commission succeeds in its goal (FERC Brief at 8) of having the matter remanded to it, it is easy to foresee the prospect that, after the Commission constructs some "legal" support for the overruling it has already determined upon, the matter will again be brought before a court of appeals. Whatever the decision of the court of appeals, the unsuccessful parties will undoubtedly seek certiorari from

---

[2]We submit that this explanation is the only one consistent with the sequence of events. However, if additional support is required, we point out that in referring to the *Bountiful* decision, the Director, Division of Public Information of the Commission has told the press "That decision was made during the Carter administration. . . . This is a different commission." Associated Press, Business News Section, carried over the AP Wire on April 29, 1983 (p.m. cycle) over the byline of Matt Yancey, on NEXIS. The four new Commissioners referred to by the Solicitor General were all appointed by the new administration.

[3]It is respectfully submitted that the Commission has not yet evolved a legal basis. It has, instead, reached an impermissible policy judgment reserved solely to Congress although it no doubt will, if successful in obtaining legitimate jurisdiction, construct some purported "legal" analysis to rationalize its current decision.

this Court. By that time, it is quite possible that the Commission may again be comprised of appointees of yet a newer administration and may, if permitted here to do so, seek to have the matter again remanded to it for reversal. Surely, a purely legal decision on the construction of a 1920 statute should not be allowed to be a perpetual weathervane swinging with the winds of each succeeding administration.

Santa Clara believes that the effective administration of law requires that after so many years the issue of whether there is a municipal preference on relicensing should be definitively decided.[4]

We believe that, for the reasons expressed in the Brief In Opposition of the City of Bountiful, Utah, the most appropriate method of resolution is denial of the Petitions for Certiorari. However, since the overwhelming interest of Santa Clara and other parties in its position is to secure expeditious finality,[5] it

[4] The Solicitor General suggests that "The situation created by these new circumstances is especially delicate in view of the fact that the court of appeals, in interpreting the statute as it did, gave 'great deference' to the Commission's previous views. . . . " (FERC Brief at 9). However, immediately before its statement on deference, the court of appeals concluded "We have reviewed the Commission's interpretation of this statute and deem such construction consistent with the statute's language, structure, scheme, and available legislative history" (PG&E Pet. 13a). Obviously, there is nothing in the opinion of the court of appeals which suggests, nor could it logically be suggested, that the contrary interpretation – the one the Commission is now ready to adopt – would be "consistent with the statute's language, structure, scheme and available legislative history." Moreover, the court of appeals found that the contrary interpretation would lead to "absurd" and "more absurd results" (PG&E Pet. 10a). Furthermore, the Commission has had its chance to render its opinion and to support it before the court of appeals. The Commission has no further right to overrule its position and certainly no right to expect deference to be paid to its contortions. This Court over a century ago recognized that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, . . . speculate of chances from changes in its [a court's] members." *Roberts* v. *Cooper*, 61 U.S. (20 How.) 467, 481 (1858). Here, and even more repugnantly, it is the current Commission which wishes to elongate an already elongated proceeding to permit an overruling based on "chances from change in its members."

[5] The underlying competitive relicensing proceeding of Santa Clara involves a license which expired in 1975 and a proceeding which has been

would be preferable for this Court, if it is not willing simply to deny certiorari, to grant certiorari and to resolve the matter on its merits. We submit that any action along the lines suggested by the Solicitor General would acquiesce in and acknowledge, even if only in part, the politicalization of the decision of this Commission, and operate as an encouragement to employment by this and other commissions of the same distressing tactic. That suggestion should be rejected. Rejection would also avoid any possible litigation of the serious question of whether, having apparently already determined the outcome of remand when the issue was not before it and long after the Commission lost jurisdiction to decide the matter (16 U.S.C. §825*l*(b)), the Commissioners are legally able to withstand motions for disqualification.

The law provides that when the record is filed with the court of appeals, the Commission loses jurisdiction (*id.*). In short, the law provides that the Commission has one opportunity (including the chance to correct itself on rehearing) to make a decision and that it loses that opportunity when the record is filed with the court of appeals. The Commission's attempt here to obtain a "second bite" on a purely legal matter after that very same Commission successfully urged affirmance by the court of appeals is, to our knowledge, unprecedented. We find the total absence of case authority in the FERC Brief eloquent.

We believe the Solicitor General's suggestion that the matter be returned to the court of appeals inappropriate. In sum, while it would permit the Solicitor General to wash his hands of the unpleasant task of considering the basis of the Commission's current position and determining the appropriate position of the United States and, under established delegation, leave the Commission free to present whatever argument it desires to make, without tainting the Office of the Solicitor

---

waiting since that time for the resolution of this issue before the Commission will even set it for hearing. Some eight years of advantage have gone to PG&E by default, since the Commission automatically grants PG&E an annual license each year. More years are likely to go to PG&E by default if the proceeding is remanded to the court of appeals for any reason.

General, it would be a disservice to the interests of justice and the need for resolution of the issue.

Without confessing error, FERC seeks more from this Court than it could obtain with a confession of error. As this Court stated in *Orloff* v. *Willoughby*, 345 U.S. 83, 87 (1953):

> This Court, of course, is not bound to accept the Government's concession that the courts below erred on a question of law. They accepted the Government's argument as then made and, if they were right in doing so, we should affirm.

Here, the Eleventh Circuit was right in accepting the Commission's argument as then made. This Court should deny certiorari or affirm.

CONCLUSION

For the reasons stated above, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

Daniel I. Davidson
Counsel of Record

Robert C. McDiarmid

Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 333-4500

Attorneys for the Respondent
City of Santa Clara, California

May 18, 1983